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No. 557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE KROGER GROCERY & BAKING COMPANY, WESCO FOODS COMPANY, THE COLTER COMPANY, PAY'N TAKIT, INC., CHARLES M. ROBERTSON, JOSEPH BAPPERT, FRANK L. REOCK AND JOSEPH B. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION

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To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners and each of them above named respectfully pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered August 26, 1944 (R. 124-5), reversing a judgment entered by the district court on demurrer before trial (R. 40-1), holding fatally defective and dismiss-

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Italics supplied unless otherwise noted.

ing the indictment in two counts purporting to charge petitioners with violations of Sections 1 and 2 of the Sherman Act (Title 15, U. S. C., Sections 1 and 2) because the indictment does not meet the requirements of Article 3, Section 2, Paragraph 3, and of the Fifth and Sixth Amendments of the Constitution.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 26, 1944 (R. 124-5). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U.S.C., Sec. 347).

OPINIONS OF THE COURTS BELOW

The opinion of the district court is reported in 51 Fed. Supp. 448 and in the Record (pp. 33-53). The original opinion of the Court of Appeals rendered January 17, 1944, to which Judge Vaught dissented, is not reported but is printed as an appendix to the petition for writ of certiorari, filed by Safeway Stores, Inc., at pp. 29-53 thereof, (No. ——— October Term, 1944). The opinion of the Court of Appeals on rehearing rendered August 26, 1944, and the dissenting opinion of Judge Phillips to which he appended the dissent of Judge Vaught to the first decision are not yet reported but are printed in the Record in the order stated. (Majority opinion, R. 89-107, dissent of Judge Phillips, R. 107-110; dissent Judge Vaught, R. 111-124.) The opinion of the Court of Appeals, rendered August 26, 1944, covers case No. 2807, involving a separate indictment against Safeway Stores, Inc., Maryland, et al., returned in the same court as the Kroger indictment (case No. 2808) and substantially similar thereto. However, the

opinion also deals with eight other cases, Nos. 2792 to 2799, inclusive, involving indictments brought in the District Court of Colorado, respecting an alleged conspiracy in that state having as its objective retail sale prices of alcoholic beverages in Colorado which were determined to concern intrastate commerce and which are wholly disassociated from the grocery indictments against Kroger and Safeway.

THE STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act as amended (Title 15, U.S.C., Secs. 1 and 2, 26 Stat. 209).

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioners were indicted in the District of Kansas on two counts (R. 1-24). The first count alleged a conspiracy by The Kroger Grocery & Baking Company, three subsidiaries and five individuals as officers of the Kroger company, and others unknown, to restrain interstate trade in "food and food products" (R. 16) somewhere in the United States, sometime during the twenty-six years preceding the return of the indictment (R. 2). The second count alleged in similar language that the conspiracy was "to monopolize a substantial part of the aforesaid interstate trade and commerce" (R. 19). Jurisdiction and venue in Kansas are asserted by charging that the conspiracy was carried out "in part" within the District of Kansas and that the petitioners performed in Kansas "many" of the acts set forth in Paragraph 20, and also since September 1, 1939, advertised "food and food products in Kansas City and elsewhere in the State of Kansas, below cost and below the price charged by them for similar products in other locations" (R. 19). The petitioners filed a joint demurrer to the indictment (R. 25).

The district court sustained the demurrer and dismissed the indictment (R. 26) on the grounds set forth in the well reasoned opinion of the respected and late Judge Hopkins, reported in 51 Fed. Supp. 448 and in the Record (pp. 33-53). The Government appealed to the Circuit Court of Appeals for the Tenth Circuit where it was first heard by Circuit Judges Bratton and Phillips and District Judge Vaught. Judge Bratton wrote the majority opinion reversing the District Court. Judge Phillips concurred; Judge Vaught dissented. A rehearing was granted (R. 88). The second hearing was held April 24, 1944, before Circuit Judges Phillips, Bratton, Huxman and Murrah (R. 88). On rehearing Judge Phillips, who concurred with Judge Bratton in the majority opinion on the first hearing, was convinced that the indictment was bad. Judges Huxman and Murrah concurred with Judge Bratton in holding the indictment good. Judge Phillips then wrote a dissenting opinion and appended thereto the dissenting opinion of Judge Vaught (R. 107-110).

QUESTIONS PRESENTED

The questions presented by this petition are very simple and very important, namely,

First: Is the constitutional guarantee that "in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation" met by an indictment for conspiracy under the anti-trust laws, which charges the offense in the very words of the statute and states no "time" except sometime during the last twenty-six years and no "place" except some place within the United States, and no subject matter except "food and food products" and although alleging "*terms*" alleges no "circumstances" of said conspiracy?

Second: Assuming that (as the courts below held) the indictment does not state "acts and intent with reasonable particularity of time, place and circumstances"* so as to inform the accused of the nature and cause of the accusation, is the indictment defective and demurrable or *may it be remedied by a "bill of particulars" and the constitutional guarantee made dependent on the discretion of the trial court and information supplied by the district attorney instead of by the grand jury?*

Third: May jurisdiction and venue be laid in a district hundreds of miles from the residence of the individual defendants and from the headquarters and domicile of the corporate defendant without alleging with reasonable particularity as to time, place and circumstance, a single overt act committed in said distant district as part of said conspiracy or that any of said individual defendants have ever been in said district?

REASONS RELIED UPON FOR GRANTING THE WRIT

First: Because the Court of Appeals decided an important question of federal law involving the civil and constitutional rights of individual defendants and the constitutional rights of the corporate defendants and the decision is in conflict with the decisions of this court in the following cases:

United States v. *Simmons*, 96 U. S. 360, 362
United States v. *Hess*, 124 U. S. 483, 487
Evans v. *United States*, 153 U. S. 584, 587
Hagner v. *United States*, 285 U. S. 427, 431
Glasser v. *United States*, 315 U. S. 60, 66

The Sixth Amendment to the Federal Constitution provides: "In all criminal prosecutions the accused shall en-

* *United States* v. *Cruikshank*, 92 U. S. 542, 557.

joy the right . . . to be informed of the nature and cause of the accusation."

The Fifth Amendment provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy."

In the landmark case of *United States* v. *Cruikshank*, 92 U. S. 542, Chief Justice Waite stated at page 558 that the indictment must ". . . furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. *A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.*" These requirements have never been departed from—until now. It has continuously been held that "every ingredient of which the offense is composed must be accurately and clearly alleged *in the indictment.*" *

The holding of the Court of Appeals that the indictment in the case at bar (analyzed in our brief) can be "remedied" by a bill of particulars makes a mockery of these constitutional requirements. Stripped of surplus language and conclusions, the indictment simply charges that the Kroger Company entered into a conspiracy with itself and its officers to restrain and monopolize interstate trade in "food and food products" sometime in the twenty-six year period from 1917 to 1943 somewhere in the United States. The time is nowhere stated. The place is nowhere stated. The subject matter is stated simply as food and food products, which includes food for humans, poultry and livestock. The period involved covers the business life of the defendants. The area covers America. The subjects are

* *United States* v. *Cook*, 84 U. S. 168, 174.

unnamed and could consist of many thousands of items. The defendants are not furnished with any information from which it is possible to prepare a defense. They cannot prepare to defend themselves as to every act over this vast period of time and over this vast area with respect to this vast number of subjects. Nor does the indictment purport to cover all the time or all the area or all the subjects. The defendants are left completely in the dark as to what time, what area and what subjects are involved in the alleged conspiracy. As Judge Phillips said at bar: "The indictment places on defendants a burden beyond human comprehension."

This Court recently said in *Glasser* v. *United States*, 315 U. S. 60, in discussing the Sixth Amendment:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where scales of justice may be delicately poised between guilt and innocence." (p. 67)
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> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power." (p. 69)
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> "This (right to assistance of counsel) is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty." (p. 69)

and that this right is

> "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (p. 76)

Second: Because the constitutional guarantee that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him with reasonable particularity as to time, place and circumstance does not rest in the *discretion* of the trial judge in granting or denying a motion for a bill of particulars, or on information

supplied by the district attorney, not found by the grand jury. The guarantees of civil rights contained in the Sixth Amendment are absolute and mandatory, and we contend that the failure to comply with constitutional provisions cannot be "remedied" at the unreviewable *discretion* of the trial judge.

It is apparent that the majority opinions of the court below construe the indictment as defective (1) in failing to specify or describe "the kind or kinds of food and food products" (R. 101); (2) in alleging a conspiracy to acquire the business of independent retail grocers and local chains throughout the United States, "without naming or giving the location of the grocers and chains" (R. 101); (3) in charging that the defendant selected local areas to injure competition of independent grocers, meat dealers and local food chains, "without specifying the areas or naming the grocers, meat dealers or food chains" (R. 101). (4) The majority further held that the indictment contained further vague and general charges "not necessary to detail, *with similar omissions*" (R. 101), and then said "but these indictments each charge in *general terms* a conspiracy to restrain interstate trade and commerce, or to monopolize such trade and commerce, as the case may be, *substantially in the language of the Act.* And if the allegations in respect to the manner and means of effecting the object of the combination and conspiracy are not set forth in sufficient detail, *the remedy is to apply for a bill of particulars*" (R. 101).

It has frequently been held that a bill of particulars addresses itself to the sound discretion of the court, "and its action thereon is not subject to review." * The information furnished in response to the granting of a motion for a bill of particulars again rests, to a large extent, with the district attorney. Thus, the alleged "*remedy*" makes it

* *Dunlop* v. *United States*, 165 U. S. 486, 491.

unnecessary for the grand jury in returning an indictment to comply with the constitutional requirements of the Bill of Rights, and denies the accused one of the safeguards which this Court said was "deemed necessary to insure fundamental human rights of life and liberty," a right "too fundamental to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The majority applied language applicable to a conspiracy charge under Section 37 of the Criminal Code to an indictment for conspiracy under the anti-trust laws, overlooking the fact that in an anti-trust case, the conspiracy itself is the crime which must be stated with reasonable particularity as to time, place and circumstance.

Judge Phillips points out in his dissent:

> "At the oral argument, counsel for the government admitted it did not rely upon an express agreement or conspiracy but upon *acts* and *circumstances* from which a conspiracy may be implied. In neither indictment is the time, place, and circumstances of the alleged long-continued conspiracies set forth with particularity . . . I agree that it is not necessary to plead, with particularity, the time, place and circumstances of the manner and means of effecting the *objects* of the conspiracy.* But it does seem to me that the time, place and circumstances of the *unlawful agreement* should be pleaded with particularity. Paragraph 23 of the indictment in No. 2807, and Paragraph 20 of the indictment in No. 2808, do plead the *terms* of the alleged unlawful agreements. But neither alleges them with any particularity as to *time, place* or *circumstance*, leaving the government free to prove acts and conduct from which it will ask the jury to infer the unlawful agreement, in No. 2807, limited only with respect to time to a period in excess of twenty-three years, and with respect to place, within twenty states of the

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* *Glasser* v. *United States*, 315, U. S. 60, 66.

> Union and in the District of Columbia, and in No. 2808, limited only with respect to time to a period in excess of twenty-six years and with respect to place, within nineteen states of the Union."

Judge Vaught met this vital question of civil rights in his dissent as follows:

> "Certain matters, as to details, might be called for or requested by a bill of particulars, but the *indictment* must always be definite and clear as to the ingredients of the offense. If these are not set out with sufficient clarity to inform the defendant what he is required to meet, it is a defective indictment. If the ingredients of the offense are not contained within the four corners of that document, nothing that might be supplied by the prosecutor by way of a bill of particulars can suffice. It was not even contended in the Glasser case that the indictment was not specific as to the elements constituting the conspiracy. . . . Where allegations in the indictment are not definite in stating the alleged conspiracy, the place, time and manner in which the unlawful agreement was reached, which constitute the conspiracy, then the indictment is so defective that it cannot be cured by a bill of particulars."

The decision of the majority, that the defects in this indictment arising from its failure to meet constitutional requirements, can be "*remedied*" at the *discretion* of the trial court in passing upon a bill of particulars, is in conflict with the decision of other circuit courts of appeal in the following cases:

> *Fontana* v. *United States*, 262 Fed. 283 (C.C.A. 8)
> *Collins* v. *United States*, 253 Fed. 609 (C.C.A. 9)
> *Lynch* v. *United States*, 10 F. (2d) 947 (C.C.A. 8)
> *Jarl* v. *United States*, 19 F. (2d) 891 (C.C.A. 8)
> *Corcoran* v. *United States*, 19 F. (2d) 901 (C.C.A. 8)
> *Foster* v. *United States*, 253 Fed. 481 (C.C.A. 9)
> *Partson* v. *United States*, 20 F. (2d) 127 (C.C.A. 8)

Turk v. *United States*, 20 F. (2d) 129 (C.C.A. 8)
Anderson v. *United States*, 260 Fed. 557 (C.C.A. 8)
Floren v. *United States*, 186 Fed. 961 (C.C.A. 8)
Knauer v. *United States*, 237 Fed. 8 (C.C.A. 8)

Third: Because the question of whether individual defendants may be indicted and tried in a jurisdiction in which they have never been, located many hundreds of miles from their places of residence, upon vague and general conclusions is of transcendent importance.

A similar question arises with respect to the corporate defendants, whose headquarters and domiciles, and whose managerial activities are conducted in Ohio, many hundreds of miles from the district where the indictment was returned. It should be noted that the *advertising* of food products either below cost or below the price charged somewhere else in the United States which is the vague conclusion upon which venue is alleged is not even named in the indictment as one of the "*terms*" of the alleged conspiracy. The indictment will be searched in vain for any particulars as to any time, place or circumstance of forming or carrying out any conspiracy in Kansas (or elsewhere). While the venue paragraph alleges that defendants performed "many" of the "acts" set forth in Paragraph 20, said paragraph 20 sets forth no "*acts*" of any kind, but describes in broad generalities the alleged "substantial terms" of the alleged unlawful agreement. *Terms* are not *acts*, and not a single act is anywhere particularized in the indictment.

Both the letter and the spirit of the constitutional requirement contained in Article III, Section 2, Paragraph 3, that "the trial of all crimes shall be held in the state where said crimes shall have been committed," and of the Bill of Rights, that the accused shall be tried "by an impartial jury of the state and district wherein the crime shall have been committed," are flagrantly violated by this attempt to try

in Kansas a company and its individual officers for a conspiracy which they could not have formulated or entered into in that district because they have never been there and because it is alleged that the policies of the corporations involved were determined by its managerial officers at its headquarters in Ohio. Nor does the indictment allege a single overt act pursuant to the conspiracy, within the state of Kansas. The indictment substitutes for the failure to particularize as to any acts, a mere conclusion as to "many acts" having been done. Conclusions are not admitted by demurrer.

This question squarely presents the issue as to whether citizens are to be tried hundreds of miles from their homes, and corporations hundreds of miles from their headquarters, books and records, on general conclusions, without being given any information as to the time, place or circumstances of a single act having been performed in the jurisdiction in which the indictment was returned. The question is fundamental to the liberty of American citizens. It is not technical, but so practical that the practice followed in this case operates to deny the accused a fair opportunity to defend.

CONCLUSION

The importance of the above three questions relating to the administration of criminal justice is such that this court should grant certiorari.

United States v. *Johnson*, 319 U. S. 503
Bowles v. *United States*, 319 U. S. 33
Roberts v. *United States*, 320 U. S. 264
McNabb v. *United States*, 318 U. S. 332
Anderson v. *United States*, 318 U. S. 350
Labor Board v. *I. & M. Electric Co.*, 318 U. S. 9
Jerome v. *United States*, 318 U. S. 101

For the foregoing reasons we earnestly submit and pray that a writ of certiorari be granted and that this court review and settle the questions herein presented.

Respectfully submitted,

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